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Supreme Court, U.S.
FILED
MAY 13 2005
OFFICE OF THE CLERK

No. 04-1257

IN THE

Supreme Court of the United States

FRANCES D. KETTENBACH,

Petitioner,

v.

RAFAELE LORAINE DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS AND NEXT FRIEND OF VANESSA EVAN DEMOULAS, DIANA D. MERRIAM, FOTENE J. DEMOULAS, ARTHUR S. DEMOULAS AND EVANTHEA DEMOULAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION FOR RESPONDENTS DIANA D. MERRIAM, FOTENE J. DEMOULAS, ARTHUR S. DEMOULAS, AND EVANTHEA DEMOULAS

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STATEMENT OF THE CASE

I. The Misstatements In The Petition For A Writ Of Certiorari.

Pursuant to Supreme Court Rule 15.2, certain of the respondents, Arthur S. Demoulas, Diana D. Merriam, Fotene J. Demoulas and Evanthea G. Demoulas (hereafter "Respondents") wish to correct the misstatements in the Statement of the Case filed by the Petitioner. She states that there were acrimonious and widely publicized pretrial litigation from 1990 through 1994. Petition, p. 4. This was not the case. The litigation proceeded without any significant publicity until the trial of the Stock Transfer Case in 1994. Discovery was in the hands of a Discovery Master, and although it did consume much of the plaintiffs' and defendants' counsels' time during these four years, it was virtually without incident. It was only when the defendants faced defeat that acrimony and underhanded conduct began.

The Petitioner alleges, as have the defendants over the past ten years, that the trial court, *sua sponte*, reversed its dismissal of the defendant children of Telemachus Demoulas in the Stock Transfer Case after its decision in the Shareholder Derivative Case. Petition, p. 4. This is not the case. Prior to the commencement of the Shareholder Derivative Case, Judge Lopez received briefs arguing for and against the reversal of her decision to dismiss the claims against the defendant children of Telemachus and there was oral argument on the issue. R. App. 37, docket nos. 260, 266.

In the Petition, it is stated that Judge Lopez "bizarrely" testified that "the defendants and their counsel instigated or filed false affidavits against her, had her followed, searched her trash, placed electronic listening devices in her home and her judicial chambers and illegally reviewed her financial

records." Petition, p. 9. In fact, Judge Lopez only testified that the defendants and their counsel filed false affidavits against her, and further that she knew the content of the affidavits to be false. R. App. 904. The rest of the allegations had been reported to her by outside sources, including governmental authorities. *Id.*

II. The Motions For Recusal.

The Petition describes in a cursory manner the three prior motions for recusal with which the Supreme Judicial Court dealt. In light of the case law, *infra*, these Respondents believe that the reasoning of the Supreme Judicial Court requires more explication.

In *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501 (1997) ("*Demoulas I*"), counsel for the Petitioner moved, before the trial began, that Judge Lopez recuse herself because of the impressions formed of the defendants during the trial of the Stock Transfer Case. *See id.* at 524. The Supreme Judicial Court held that "[n]one of the specific rulings cited by the defendants discloses a lack of impartiality on the judge's part." *Id.* at 526. All of the "sharp remarks" of the trial judge could be attributed to the "long, arduous, and at times, very bitter" conduct of the trial. *Id.* The Supreme Judicial Court was compelled to give credence to the judge's credibility findings because they were supported by numerous findings of fact. *See id.*

Demoulas v. Demoulas Super Markets, Inc. 428 Mass. 543 (1998) ("*Demoulas II*") concerned the allegations of the interaction between the trial judge and plaintiffs' lead counsel at the Charles Restaurant, a small neighborhood bistro which was eventually acquired by the judge's husband after the alleged communications between the judge and plaintiffs' counsel were said to have taken place. The Supreme Judicial

Court affirmed the denial of the defendants' motion based on its untimeliness and on the insufficiency of the allegations. *See id.* at 547-552. The court noted that the motion to recuse was filed on the eve of the execution of the judgment in the Shareholder Derivative Case, almost two years after the Supreme Judicial Court had affirmed judgment in favor of the plaintiff. *See id.* at 544. "Nor are we required to turn a blind eye to the fact that the motion was filed at the eleventh hour after years of maneuvering by the defendants on the losing side of a judgment in excess of one hundred million dollars." *Id.* at 550. In assessing the sufficiency of the affidavits, the court found that, taken at face value, they were "insufficient to establish a reasonable basis for questioning the judge's impartiality." *Id.* at 552. In other words, the defendants' motion was "too little, too late." *Id.*

Demoulas v. Demoulas, 432 Mass. 43 (2000) ("*Demoulas IV*") provided the crowning effort for the defendants' recusal motions. This strategy began after the decision of Judge Lopez in the Shareholder Derivative Action in 1995. Certain agents of the losing Telemachus Demoulas faction decided to implement an extremely complex and diabolical scheme to entice Judge Lopez' law clerk during the Shareholder Derivative trial to reveal, in the context of a fictitious job interview, the supposed predisposition of Judge Lopez against the defendants. *See*, *id.* at 47-48. Counsel for the defendants lured the clerk, Paul Walsh, to Nova Scotia and then to New York in an effort to tape, they hoped, his disclosures of Judge Lopez' bias against the defendants.[1] *See id.* Presumably because they did not get the disclosures they sought, the defendants' counsel eventually confronted Mr. Walsh and threatened him with disclosure of a falsified bar application

1. Three of the defendants' attorneys have been the subject of hearings by the Massachusetts Board of Bar Overseers and have been recommended for disbarment. *See* Jonathan Saltzman and Ralph Ranalli, *Disbarment Urged For Three In Scheme*, Boston Globe, May 12, 2005, p.1.

which would ruin his career. *See id.* at 48. Once again, the Supreme Judicial Court found that the defendants' motion was untimely (at least two years after the events which gave rise to the motions to recuse) *id.* at 50, and that the allegations were insufficient due to the fact that they were based on impermissible hearsay. *See id.* at 53-54.

DISCUSSION

I. The Petition Should Be Denied Because It Articulates No Compelling Reason For The Court To Exercise Its Discretion To Review This Matter Under Supreme Court Rule 10.

The Court should deny the Petition on grounds that Petitioner has failed to articulate any compelling reason justifying review as prescribed by Supreme Court Rule 10 (a-c). "Review on a writ of certiorari is not a matter of right, but of judicial discretion." *Id. See also Durham v. United States*, 401 U.S. 481, 483 n.1 (1971). The "principal purpose" for which the United States Supreme Court exercises its discretion to grant certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991) (citing Supreme Court Rule 10). "[T]he Court seldom takes a case merely to affirm settled law[.]" *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting) (disagreeing with Court's grant of certiorari review of issue where all the courts of appeal to consider the issue reached substantially the same conclusion); *Buntz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 189 (1973) (Stewart, J. dissenting) (declaring the Court's grant of certiorari a "mystery" where "the case involves no more than the application of well settled principles to a familiar situation, and has little significance except for the respondent.").

Petitioner principally complains about a discrete decision by the Massachusetts Superior Court denying her motion for relief from two final judgments, entered more than four years and two-and-a-half years prior respectively, under Massachusetts Rules of Civil Procedure 60(b) on grounds that Petitioner discovered new evidence of judicial bias on the part of the trial court judge, the Honorable Maria Lopez. As Petitioner acknowledges, this motion marked the fourth time the defendants had raised the issue of judicial bias in the course of these proceedings at the Superior Court level. In each of the prior instances the matter was considered and rejected by the trial court, and affirmed on appeal by the Supreme Judicial Court. This fourth motion is little more than a rehashing of the defendants' prior accusations, thrice rejected by the highest court of Massachusetts. The Superior Court's denial of Petitioner's Mass. R. Civ. P. 60(b) motion, and the Massachusetts Appeals Court's affirmance of that decision, were premised upon longstanding rules of state law, and were in lockstep with the three prior appellate decisions on this issue.

Petitioner identifies no manner in which the most recent rejection of her claims by the Supreme Judicial Court conflicts with a decision of any other United States Circuit Court of Appeals or any state court of last resort on an important issue of federal law. The grounds for certiorari review under Rule 10(a) are inapplicable as Petitioner does not appeal from a decision of a United States Circuit Court of Appeal. Nor are the provisions of Rule 10(b-c) implicated, as the Supreme Judicial Court has not decided any important federal question that either conflicts with a decision of another state supreme court, this Court, or which has not been decided by this Court but should be. To the contrary, Petitioner acknowledges that none of the three Massachusetts courts below even reached the federal questions she now raises, let alone decided these questions in a manner contradictory to that of another jurisdiction. Petition pp. 10, 20.

Although Petitioner stresses that Massachusetts' judicial recusal procedure differs from that adopted by a minority of other jurisdictions, Petition § II, the mere existence of a disparity among the laws of sister states is not a valid ground for certiorari review. *Compare* Rule 10(b) (certiorari appropriate where "a state court of last resort has decided *an important federal question* in a way that conflicts with the decision of another state court of last resort[.]") (emphasis added). Petitioner cites no decision of another state court of last resort which conflicts with the decision of the Supreme Judicial Court in the instant case on an important issue of federal law. Moreover, while Petitioner complains that the Massachusetts approach to judicial recusal is unconstitutional in that it permits the judge whose sensibilities are in question to assess his or her own impartiality, in the present case it was a second judge who determined the defendants had failed to establish that Judge Lopez was biased. Judge Lopez had resigned from the bench by the time Petitioner had moved for relief from judgment, and it was the Honorable Patrick J. Brady who adjudicated Petitioner's claim of bias to be insubstantial. Appendix B to Petition ("App.") pp. 3-4. Petitioner has therefore failed to allege sufficient grounds under Rule 10 to justify this Court's exercise of its discretion to grant certiorari.

II. The Judgment Was Based On An Independent And Adequate State Law Ground Separate And Apart From Petitioner's Federal Claims.

A. Procedural Rules May Form Independent And Adequate State Law Grounds.

Where a state court judgment rests on a nonfederal ground, this Court must decline to accept jurisdiction and deny the Petition. *See Ellis v. Dixon*, 349 U.S. 458, 459 (1955). "This Court will not review a question of federal

law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (citing *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)) (further citations omitted). "This rule applies whether the state law ground is substantive or procedural." *Id.* at 729 (citing *Fox Film Corp., supra*; *Herdon v. Georgia*, 295 U.S. 441 (1935)); *Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982).

A state procedural ground is deemed "adequate" where it is "regularly followed[,]" *Hathorn*, 457 U.S. at 262-63 (citing *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)), so long as it is applied "evenhandedly to all similar claims." *Id.* In addition, the state must have "a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 264 n.4 (1964)).

Here, the Massachusetts Appeals Court based its decision to affirm the decision of the Superior Court strictly on state law grounds. Petition, pp. 10, 20. First, the Appeals Court held that Petitioner's motion for relief from judgment pursuant to Mass. R. Civ. P. 60(b) was untimely. Second, that Petitioner's allegation of bias on the part of the trial judge had thrice been considered and rejected by the Supreme Judicial Court, and was now the law of the case. The Supreme Judicial Court, without comment, declined to grant Petitioner's request for further review of this matter.

B. Mass. R. Civ. P. 60(b) Is Firmly Established And Regularly Followed.

There can be no serious question that the courts of the Commonwealth of Massachusetts regularly follow the timeliness requirements of Mass. R. Civ. P. 60(b) and that

this rule is firmly established. Rule 60(b) permits relief from a final judgment in the event of:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> . . .
>
> (6) any other reason justifying relief from the operation of the judgment.

A litigant must move for such relief "within a reasonable time, and for reasons (1), (2), and (3) *not more than one year* after the judgment, order or proceeding was entered or taken." *Id.* (emphasis added).

Massachusetts courts have routinely applied this language as restricting the circumstances in which a litigant may seek relief under the catchall provision of Rule 60(b)(6), which is not subject to the definitive one-year time limit applicable to subsections 1 through 3, when the basis for relief articulated could fall within subsections 1 through 3. "Relief under rule 60(b)(6) is only appropriate when justified by some reason other than those set forth in rule 60(b)(1)-(5)." *Sahin v. Sahin*, 435 Mass. 396, 407 (2001) (citing *Anderson v. Anderson*, 407 Mass. 251, 257 (1990); *Bromfield v. Commonwealth*, 400 Mass. 254, 256 (1987); *see also Honer v. Wisniewski*, 48 Mass. App. Ct. 291, 295 (1999). "In other

words, to prevail under rule 60(b)(6), a party must show that there is a reason to justify the relief, and also that the reason is not within the grounds set forth in rule 60(b)(1)-(5)." *Id.* (citing *Parrell v. Keenan*, 389 Mass. 809, 814-15 (1983)); *accord In re Paternity of Cheryl*, 434 Mass. 23, 35 (2001); *Bromfield v. Commonwealth*, 400 Mass. 254, 256 (1987); *Bird v. Ross*, 393 Mass. 789, 791 (1985); *Chavoor v. Lewis*, 383 Mass. 801, 805-806 (1981); *Honer*, 48 Mass. App. Ct. at 295; *Murphy v. Administrator of the Div. of Personnel Admin.*, 377 Mass. 217, 228 (1979); *Tibbitts v. Wisniewski*, 27 Mass. App. Ct. 729, 731 (1989).

Though she feigns surprise that the Appeals Court treated her motion for relief from judgment as one arising under Rule 60(b)(1), (2), or (3), and thus subject to the one-year time limitation, *Petitioner herself* argued explicitly *in support* of this position to the Appeals Court. At pages 26 and 27 of Petitioner's Massachusetts Appeals Court Brief, under the heading entitled "Rule 60(b)", Petitioner argued:

> Several grounds specified in Rule 60(b) apply to the facts in this case - 60(b)(1), surprise; 60(b)(2), newly discovered evidence which by due diligence could not have been discovered; 60(b)(3), fraud; and 60(b)(6), any other reason justifying relief from the operation of the judgment.

This plain and candid acknowledgment by Petitioner that the basis for her motion for relief from judgment fell squarely within subsections 1 through 3 of Rule 60(b) left no doubt that they were foreclosed from seeking relief under Rule 60(b)(6). Accordingly, the decision of the Appeals Court to hold the Petitioner's motion subject to the one-year time limit was consistent with the holdings of the long line of cases cited above. *E.g.*, *Sahin*, 435 Mass. at 407.

Petitioner's attempt to reverse course at this late hour is impermissible, as she is estopped from shedding the position she argued forcefully below to assert a contrary one to this Court in the first instance. *E.g. New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (under the doctrine of judicial estoppel, where a party assumes a certain position in a legal proceeding, and persists in maintaining that position, he may not thereafter assume a contrary position simply because his interests have changed) (collecting authority). Moreover, had the Supreme Judicial Court granted Petitioner's request for further review of this issue, she would have been "estopped from reversing [her] earlier positions" before that court as well. *Fortin v. Ox-Box Marina, Inc.*, 408 Mass. 310, 323 (1990); *accord Brown v. Quinn*, 406 Mass. 641, 646 (1990) (collecting authority).

Moreover, Petitioner's contention that her motion could only have been construed as arising under the catchall provision of subsection 6 because her belated discovery of further evidence of Judge Lopez' supposed bias against them can only be characterized as "fraud on the court", as opposed to "newly discovered evidence", is erroneous as a matter of Massachusetts law. Petition, pp. 22-24. The Supreme Judicial Court has held that fraud on the court occurs "'where it can be demonstrated, clearly and convincingly, that *a party* has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.'" *Sahin*, 435 Mass. at 405-406 (quoting *In re Paternity of Cheryl*, 434 Mass. at 35) (emphasis added); *accord Rockdale Management Co., Inc., v. Shawmut Bank*, 418 Mass. 596, 598 (1994) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944)). Petitioner points to no Massachusetts case holding that opinions formed by judges of the litigants before them

can constitute a such fraud against the judicial system as a whole. Their effort to cast the trial judge's statements, ostensibly expressing a negative view of the defendants nearly ten years following the commencement of the first trial, as evidence of the *Judge's* deliberate scheme to defraud or manipulate *herself*, lacks any support in Massachusetts case law and is simply illogical.

Moreover, Petitioner's claim was best characterized as one involving newly discovered evidence, albeit cumulative and insufficient. The defendants had already raised the issue of judicial bias repeatedly throughout these proceedings. The testimony on which Petitioner premised her motion is merely more of the same, cumulative to the evidence upon which the defendants founded their accusation the first three times they asserted it.

Plainly, Petitioner's most recent re-tooling of her basis for relief from judgment as "fraud on the court" is an attempt at an end-run around the one-year limitation of Rule 60(b)(1-3). The Appeals Court's decision that Petitioner's claim was cognizable under any of subsections 1 through 3, and that the one-year limitation applied to bar her claim of newfound evidence of judicial bias, was in keeping with well established and consistently enforced principles of Massachusetts law.

C. Mass. R. Civ. P. 60(b) Promotes The Legitimate State Interest Of Finality Of Judicial Decisions.

Massachusetts Rule of Civil Procedure 60(b) is based upon the legitimate state interest of promoting the finality of judgments. "It is the function of rule 60(b)(6) to preserve the delicate balance between the sanctity of final judgments . . . and the incessant command of the court's conscience that justice be done in light of all the facts." *Winthrop Corp. v. Lowenthal*, 29 Mass. App. Ct. 180, 188 (1990) (quoting

Freitas v. Freitas, 26 Mass. App. Ct. 196, 198 (1988) (citing *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970)) (further citations omitted); *see also* J.W. SMITH & H.B. ZOBEL, RULES PRACTICE, § 60.15 (1983 Supp.). "That tension between finality and fair play (finality itself, of course, being a form of fair play) finds voice in warnings that the rule should not be used as an instrument for relief from deliberate choices which did not work out." *Id.* (citing *Ackermann v. United States*, 340 U.S. 193, 198-199 (1950)) (further citations omitted). "In the interest of finality of judgments, relief under rule 60(b)(6) is only to be granted in extraordinary circumstances." *Sahin*, 435 Mass. at 406 (citing *Bromfield v. Commonwealth*, 400 Mass. 254, 257 (1987)) (further citations omitted); *see also Chiu-Kun Woo v. Moy*, 17 Mass. App. Ct. 949, 950 (1983) (concern about finality of litigation is an appropriate consideration when acting on motion for relief from judgment). It is axiomatic that the promotion of finality of judgments, while preserving the possibility for relief from judgments under extraordinary circumstances, is a legitimate state interest, essential to a fair and efficient judicial system in which litigants may safely rely upon the judgments of the courts. Accordingly, the one-year time limitation of Mass. R. Civ. P. 60(b) constitutes an adequate basis in state law precluding review of the issues upon which Petitioner seeks certiorari.

D. The Doctrine Of Law of Case Is Firmly Established And Regularly Followed.

The second ground upon which the Appeals Court affirmed the Superior Court's denial of Petitioner's Rule 60(b) motion was that Judge Lopez' prior denials of the defendants' repeated motions for recusal had been reviewed by the Supreme Judicial Court on three separate occasions and had, in each instance, been affirmed. (App. pp. 1-2, 22-

26). The Appeals Court accordingly held that the question of Judge Lopez impartiality, which she maintained despite the defendants' outrageous and deceitful conduct aimed at her and her staff, had been finally decided and was the law of the case. *Id.* The law of the case is an adequate state law ground as it is firmly established and routinely followed by the courts of Massachusetts.

"The 'law of the case' doctrine reflects this court's reluctance 'to reconsider questions decided upon an earlier appeal in the same case.'" *King v. Driscoll*, 424 Mass. 1, 7-8 (1996) (quoting *Peterson v. Hopson*, 306 Mass. 597, 599 (1940)). "An issue once decided, should not be reopened unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Id.* (quoting *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967)) (internal quotation marks and further citations omitted). It is consistently adhered to by the courts of Massachusetts. *E.g. King*, 424 Mass. at 7-8; *Horvitz v. Commissioner of Revenue*, 60 Mass. App. Ct. 1103, 2003 WL 22764593 *2 (2003) (Table); *Commonwealth v. Hall*, 55 Mass. App. Ct. 1105, 2002 WL 1358480 *1 (2002) (Table); *Vittands v. Sudduth*, 49 Mass. App. Ct. 401, 413 (2000).

"Issues of bias and self-interest, to be disqualifying, cannot be unilaterally created by the moving party." *In re WHET, Inc.*, 33 B.R. 424, 433 (D. Mass. 1983). Any feelings Judge Lopez had or has for the Petitioner has been entirely created by her, and not solely in connection with the Commission on Judicial Conduct ("CJC") hearings, but throughout this long litigation. The Supreme Judicial Court, the Appeals Court and the Superior Court are satisfied that she could put those feelings aside and judge the case fairly "in accordance with our laws." R. App. at 905. That is the "law of the case" and it should be permitted to stand.

That this doctrine has certain recognized exceptions does not, as Petitioner contends, mean that it is "permissive", or anything other than a well established rule with clearly delineated contours. Petition, p. 24. The fact that the rule calls upon state court judges to determine whether, in a specific instance, a prior ruling of an appellate court "was clearly erroneous and would work a manifest injustice", does not mean that the rule is not applied "evenhandedly to all similar claims." *Hathorn*, 457 U.S. at 263. Petitioner's reliance on *King* to support her flawed contention is misplaced. Rather than disregard this rule, the Supreme Judicial Court in *King* expressly concluded that none of the recognized exceptions were applicable on the facts before it, and declined to revisit issues already addressed on prior appeals. *See King*, 424 Mass. at 8. In the instant case, asked to reopen an issue which was the subject of three prior appellate decisions and with scant evidence that the prior decisions were ill founded, the Appeals Court reached the same conclusion as the court in *King*.

E. The Doctrine Of Law Of The Case Serves A Legitimate State Interest.

The doctrine of law of the case, like Mass. R. Civ. P. 60(b) discussed above, fosters the important state interest of promoting consistency among judicial rulings, finality, and judicial efficiency, avoiding needless relitigation of issues previously adjudicated by both a lower and an appellate court. Finality and judicial efficiency have not, until now, been the hallmark of this litigation. The issue of Judge Lopez' recusal was before the Supreme Judicial Court three times and each time the court carefully considered the defendants' contentions. *See Demoulas I* at 524-527; *Demoulas II* at 544-553; *Demoulas IV* at 45-55. *Demoulas II* concerned the allegations of the defendants regarding Judge Lopez' alleged conduct at the Charles Restaurant. Judge Lopez denied

defendants' motion to recuse, holding that the allegations were premised upon false affidavits. R.App. 185. The Supreme Judicial Court had this record before it when it decided *Demoulas II*, and it affirmed the decision of Judge Lopez. *Demoulas IV* principally concerned what the "fruits" of the defendants' scheme to trick Judge Lopez' law clerk into making damaging admissions about the judge during phony job interviews staged by counsel for the defendants. The Supreme Judicial Court had before it the evidence of this hoax when it decided *Demoulas IV*. Accordingly, when the Supreme Judicial Court again affirmed Judge Lopez refusal to recuse herself, the court was aware that Judge Lopez considered the defendants and their counsel, at a minimum, to be deceptive and allied against her. When Judge Lopez voiced these facts and impressions at the CJC hearings, it was not new information. Rather, it had already been considered when the Supreme Judicial Court decided *Demoulas II* and *Demoulas IV*. It was, indeed, the "law of the case".

Finality and judicial efficiency are legitimate state interests, particularly in this case which has been pending for fifteen years. As the Fifth Circuit Court of Appeals stated:

> The law of the case rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members, and that it would be impossible for an appellate court to perform its duties satisfactorily and efficiently and expeditiously if a question, once considered and decided by it were

> to be litigated anew in the same case upon any and every subsequent appeal thereof.

White, 377 F.2d at 431 (citations and internal quotation marks omitted).

In this case, this Court should promote that sound public policy and refuse to reopen what has already been decided. The Petitioner has had three chances to go back to square one and start over. She has gone to incredible lengths to unseat Judge Lopez, and is analogous to the woman who kills her parents, and then throws herself on the mercy of the court because she is an orphan. Accordingly, because the law of the case doctrine rests on sound policy and promotes a legitimate state interest, it constitutes an adequate basis in state law precluding review of the issues on which Petitioner seeks certiorari.

III. Petitioner Has Waived Review Of Its Claims By This Court.

A. Petitioner Waived Review Of Question One, Whether The Massachusetts Judicial Recusal Test Itself Offends Petitioner's Fourteenth Amendment Right To A Fair Trial By A Fair Tribunal Under The United States Constitution, By Failing To Raise This Issue In Either The Superior Court Or Appeals Courts In The First Instance.

Petitioner's failure to raise Question One at any point before the Superior Court or Appeals Court barred its review by the Supreme Judicial Court and, accordingly, bars certiorari review of this issue as it was never decided below. A failure to comply with the applicable state rules for properly presenting a federal claim to the state's highest court will

bar certiorari review of such issue by this Court under 28 U.S.C. § 1257. *See Adams v. Robertson*, 520 U.S. 83, 86-88 (1997) (per curium); *see also Tyler*, 436 U.S. at 512 n.7. It is a well established rule of procedure in Massachusetts that a matter cannot properly be presented to the Supreme Judicial Court where it has not been pleaded or tried in the lower court in the first instance. *E.g. Penney v. First Nat'l Bank of Boston*, 385 Mass. 715, 718 n.2 (1982) (citing *Paro v. Longwood Hosp.*, 373 Mass. 645, 652 n.9 (1977) (failure to raise below a procedural due process claim arising under Massachusetts Declaration of Rights bars review by Supreme Judicial Court); *Royal Indem. Co. v. Blakely*, 372 Mass. 86, 87-88 (1977) (collecting authority); *Trustees of the Stigmatine Fathers v. Secretary of Administration & Fin.*, 369 Mass. 562, 565 (1976)).

Petitioner's contention that she could not raise this issue before any court other than the Supreme Judicial Court in the first instance is meritless. While it is true that an intermediate appellate court lacks authority to "overrule or decline to follow the holding of cases that the Supreme Judicial Court has decided[,]" *Commonwealth v. Donohue*, 59 Mass. App. Ct. 476, 485 (2003), the Supreme Judicial Court has never passed on the issue at hand. To the contrary, the Appeals Court squarely addressed the very question Petitioner raises, concluding that the Massachusetts judicial bias standard does not violate the Fourteenth Amendment of the Constitution of the United States. *See Howe v. Prokop*, 21 Mass. App. Ct. 919, 919-20 (1985). Had Petitioner raised this issue before the Appeals Court, that court would not have been constrained by a prior binding decision of the Supreme Judicial Court, and would have been free to reexamine the issue. *Donohue*, 59 Mass. App. Ct. at 485. Indeed, this was Petitioner's obligation prior to raising the issue before the Supreme Judicial Court. *E.g. Penney*, 385 Mass. at 713 n.2.

Petitioner acknowledges that she failed to raise her federal due process challenge to the Massachusetts standard for judicial recusal at any point before the Massachusetts trial and intermediate appellate court. Petition p. 18. Review of Question One is therefor barred from review by this Court. *See Adams*, 520 U.S. at 90 ("Petitioners having thus failed to carry their burden of showing that the claim they raise here was properly presented to the Alabama Supreme Court, we will not reach the question presented.").

B. Petitioner Waived Question Two, Whether The Trial Judge's Bias Violated Petitioner's Fourteenth Amendment Right To A Fair Trial By A Fair Tribunal Under The United States Constitution, By Failing To Adequately Articulate This Issue Below.

Petitioner failed to adequately develop the second issue on which she seeks this Court's review before the Massachusetts Appeals Court, and this Court should decline to review it. Question Two, in which Petitioner contends that the bias and prejudice ostensibly exhibited by the trial judge was so pronounced as to violate her right to a fair trial secured under the Fourteenth Amendment of the United States Constitution, was raised in no more than a perfunctory, superficial, and conclusory manner below. Petitioner has failed to meet her burden of rebutting this Court's presumption that the Supreme Judicial Court's silence on her federal claim was not attributable to Petitioner's failure to properly preserve this claim for that court's review.

This Court, when "reviewing state court judgments under 28 U.S.C. § 1257 . . . will not consider a petitioner's federal claim unless it was either addressed by, or properly presented

to, the state court that rendered the decision. . . ." *Adams*, 520 U.S. at 86 (holding certiorari was improvidently granted as issue never properly presented to state supreme court).

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'

Id. (quoting *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987); further citing *Webb v. Webb*, 451 U.S. 493, 501 (1981); *Street v. New York*, 394 U.S. 576, 583-85 (1969)). A petitioner must demonstrate that "the claim [asserted] and the ground therefor be brought to the attention of the state court with fair precision and in due time." *Street*, 394 U.S. at 582.

At no point in her brief filed with the Appeals Court does the Petitioner clearly articulate her claim that the Superior Court's denial of her Rule 60(b) motion violated her rights under the Fourteenth Amendment of the United States Constitution. Petitioner mentions due process in a mere four sentences in the course of defendants' 49 page brief, and discusses this concept in general terms. Defendants' Massachusetts Appeals Court Brief, pp. 29-32. Nowhere does the Petitioner explain her position in a manner which specifically delineates her theory, beyond the superficial and conclusory claims that the trial judge was biased against her and, *ipso facto*, she was denied a fair trial. Similarly, before the Superior Court, Petitioner scatters five sentences which generically mention the Due Process Clause of the Fourteenth Amendment across a 32 page brief principally devoted to Petitioner's Rule 60(b) arguments. Defendants' Emergency

Motion For Relief From Judgment, pp. 23-27. In each instance the Petitioner leaves the specifics of her claim to the imagination.

Because Petitioner paid mere lip service to her federal claim articulated in Question Two below, she cannot carry her burden of establishing that this claim was properly presented to the Supreme Judicial Court or the Massachusetts Appeals Court, and this Court should decline to hear this claim. *Webb v. Webb*, 451 U.S. 493, 495-96 (1981) (sporadic mention of "full faith and credit" without further development and more particularized description of federal claim).

IV. Judge Lopez' Decisions Not To Recuse Herself Did Not Violate The Petitioner's Fourteenth Amendment Rights.

A. The Massachusetts Recusal Test Has The Same Components As The Federal Recusal Statute.

Massachusetts Supreme Judicial Court Rule 3:09, Canon 3 E sets forth the standards under which a judge must disqualify himself or herself. Those which are relevant to this case are an objective one: where the judge's impartiality might reasonably be questioned; and a subjective one: whether the judge has a personal bias or prejudice concerning a party or a party's lawyer. Massachusetts courts have adopted this subjective/objective application as a two-part self-examination. *See Lena v. Commonwealth*, 369 Mass. 571, 575 (1976); *Haddad v. Gonzales*, 410 Mass. 855, 862 (1991).

In 1974, Congress revised the federal disqualification statute. 28 U.S.C. § 455(a) starts out with the objective test: a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Then, the subjective test is set forth: "He shall also disqualify

himself . . . where he has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(b)(1). This Court recognized the subjective/objective nature of the revised statute in *Liteky v. United States*, 510 U.S. 540, 548 (1994). The federal recusal statute has been reviewed, analyzed and discussed by this Court, and not once has it ever been hinted that it does not pass constitutional muster. *See, e.g., Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 541 U.S. 913, 124 S. Ct. 1391, 1394 (2004); *Microsoft Corp v. United States*, 530 U.S. 1301, 121 S. Ct. 25, 26-27 (2000); *Liljberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858-66 (1988).

The Petitioner argues that the Massachusetts recusal rule is unconstitutional because Judge Lopez sat as her own judge on the recusal issue. Petition at pp. 11-14. However, the federal statute also leaves the question of recusal in the hands of the judge to whom the motion is directed. It is a "self-enforcing obligation." *United States v. State of Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987). As one federal court noted, "[r]ecusal is a highly personal decision. The judge must assess the truth of the facts alleged and determine if they would impeach his impartiality or appearance of impartiality." *Clay v. Brown Hopkins & Stambaugh*, 892 F. Supp. 11, 13 (D.D.C. 1995) (citing *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1301 (D.C. Cir. 1988)). Indeed, as Judge John Sirica, Jr. pointed out in the infamous Watergate litigation, "[o]nly the individual judge knows fully his own thoughts and feelings and the complete context of facts alleged. It follows that only he can be certain of the most equitable resolution." *United States v. Mitchell*, 377 F. Supp. 1312, 1315 (D.D.C. 1974). If it is constitutionally acceptable for a federal judge to decide whether recusal is appropriate for himself or herself, it follows that a Massachusetts judge, using substantially the same recusal test, must be able to make the recusal decision without violating the Fourteenth Amendment rights of any litigant.

B. Not All Grounds For Recusal Involve Constitutional Principles.

Judicial disqualifications as it relates to the federal constitution has been considered by this Court on a number of occasions and the application of this issue has evolved over the last seventy-eight years. In *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court considered the constitutionality of a Prohibition statute and ordinance under which a public official who presided at certain criminal trials was monetarily rewarded for each conviction, albeit only slightly. *Id.* at 520. This Court held that, even though the consideration was minor ($12 per case), it violated the due process rights of the defendants because it constituted ". . . a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant . . ." *Id.* at 532. Before reaching that conclusion, the Court held that "[a]ll questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." *Id.* at 523. Thus, a judge's personal bias against a litigant may be statutorily prohibited but there was no constitutional impediment.

Twenty-one years later, the issue of bias as a constitutional frailty was raised in *FTC v. Cement Institute*, 333 U.S. 683 (1948). In that case, one of the parties asked this Court to review the validity of a cease and desist order issued by the Commission in light of the fact that the pricing system at issue in the order had been condemned as illegal by the Commission in reports made to Congress and to the President. *See id.* at 700. The Court held that most matters concerning judicial disqualification do not involve constitutional issues and that it was not a violation of procedural due process for a judge to preside in a case where the issue at hand was one about which he had previously expressed a negative opinion. *See id.* at 702-03.

In 1986, this Court again dealt with the issue of judicial disqualification and constitutional violation. *Aetna Life Ins. Co. v. Lavore*, 475 U.S. 813 (1986) dealt with the pecuniary interest of an appeals court judge who cast the deciding vote in favor of the appellees. *See id.* at 816-17. The Court held that such interest violated the appellants due process rights under the Fourteenth Amendment. *Id.* at 824-25. In reaching this decision, the Court considered whether the judge's bias in favor of the position held by the appellee would be sufficient to disqualify the judge on constitutional grounds. *See id.* at 820-21. The decision quoted the *Tumey* case concerning the fact that personal bias did not, generally, involve a question of constitutional validity. *See id.* at 820. It then stated "We need not decide whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal. Certainly only in the most extreme of cases would disqualification on this basis be constitutionally required . . ." *Id.* at 821. Thus, for the first time, the Court was considering the possibility that personal bias could be a constitutional violation.

Finally, in *Bracy v. Gramley*, 520 U.S. 899 (1997), this Court dealt with a case in which the petitioner had been tried, convicted and sentenced to death by a judge who was later convicted himself for taking bribes from certain criminal defendants. The Court discussed the issue of constitutional judicial disqualification:

> Of course, most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. . . . Instead, these questions are, in most cases, answered by common law, statute or the professional standards of the bench

> and bar. . . . But the floor established by the Due Process Clause clearly requires a "fair trial in a fair tribunal" . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case.

Id. at 904-05 (citations omitted).

In *Bracy*, the Court moved closer to finding that *actual bias*, not presumed bias, not the appearance of impropriety, could amount to a constitutional violation. At issue in the *Bracy* case was whether the petitioner could take post-appellate discovery to discover whether actual bias toward the petitioner existed. *See id.* at 901. The Court did not decide that actual bias was constitutionally disabling because the petitioner had not yet obtained any evidence of actual bias. *See id.* at 905. Indeed, prior to the *Bracy* decision, the Court warned that those making a claim of unconstitutional judicial bias must overcome a presumption of honesty and integrity on the part of judges. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

A decision of the Eighth Circuit Court of Appeals comes closest to the issue in this case, while following the dictates of this Court concerning constitutional judicial disqualification. In *Dyas v. Lockhart*, 705 F.2d 993 (8th Cir. 1983), the court was faced with the fact that the judge presiding during the criminal trial of the appellant was related to both the Prosecuting Attorney and two of the Deputy Prosecuting Attorneys. *See id.* at 995. The judge had offered to recuse himself but appellant's counsel refused the offer. The appeal was based on the claim that the judge was necessarily biased and prejudiced against the party charged with the crime which violated the appellant's constitutional rights. *See id.* The court stated that the constitutional rights of the appellant included the right to a "fair trial in a fair

tribunal" *Id.* It then held that a demonstration of actual bias was necessary to invoke the Due Process Clause. *See id.* at 996. However, it acknowledged that the probability of actual bias was too high where the judge has been the target of personal abuse by the appellant. *Id.* In that case, the test is whether the judge, possessing ordinary human tendencies, would be unable to hold the proper balance between the contesting parties, keeping in mind the presumption of honesty and integrity of those serving as judges. *See id.* at 996-997. This is exactly the test which Judge Brady, in denying the Petitioner's motion for relief from judgment in the trial court, applied. He found that there was "no evidence that Judge Lopez did not do exactly as she said in her Memorandum of Decision dated July 22, 1997, namely, to separate her feelings about having her integrity unfairly challenged from her responsibilities to make fair and impartial rulings" Petition at App. 3. Thus, the proof of actual bias, as required by this Court, or the high probability of actual bias, acknowledged by the *Dyas* court, was not present in this case and, thus, no constitutional violation occurred.

C. This Court Can Determine Independently That Judge Lopez Harbored No Actual Bias Toward The Petitioner In Violation Of The Petitioner's Constitutional Rights.

There was no evidence of actual bias or prejudice on the part of Judge Lopez against the defendants revealed in the record of the CJC hearings. A review of the CJC transcripts demonstrates that Judge Lopez, while acknowledging that the defendants and their counsel had, indeed, set out on a protracted and intense effort to disqualify her, did her best to maintain the necessary judicial impartiality to decide the remaining issues in the litigation. She learned about both the Charles Restaurant accusations and the Paul Walsh imbroglio in the Summer of 1997. R. App. 174, 521. She

knew to an absolute certainty that these attacks on her conduct had no basis in reality. R. App. 904. However, this knowledge did not create actual bias in her head or in her heart and nothing she said in the CJC hearing proved otherwise.

CJC hearings established that Judge Lopez thought that the Demoulas defendants and their counsel harbored animus against her and her rulings. However, nothing in her testimony provides any information about her possible bias against the defendants. Not surprisingly, the most important portion of the testimony of Judge Lopez at the CJC hearings is absent from the Petition. On direct examination, her counsel asked Judge Lopez how she felt about the measures the defendants and their counsel had taken to find evidence of her supposed bias. She stated:

> Well, I mean, I was very upset that my professional reputation was being impugned that way. I mean, I knew that what was being alleged in those [Charles Restaurant] affidavits – I knew that to be false.
>
> I was very upset, and I was angry that there would be such an effort, not only to attack me personally, but to use those kinds of means to undermine *a decision that had been rendered in accordance with our laws, fairly decided.* And I thought it as an attempt on their part to disqualify me in some way – and in fact the SJC saw it that way too – to get me disqualified so that they could get a new trial on the cases, because they were unhappy with the results in that case.
>
> So they marshaled every force they could come up with to get me – to get a new judge to retry the case. And so I felt attacked. I felt besieged.

R. App. 905 (emphasis added).

Nowhere in her statement concerning her feelings about the actions of the lawyers for the defendants does Judge Lopez display any animosity toward the defendants or even toward those responsible for the attacks on her. Her language is couched in the past tense; she *was* upset and angry. There is not hint that these feelings carried over into the courtroom. In fact, after her discovery of these matters in the Summer of 1997, Judge Lopez made at least two significant decisions in favor of the defendants, one involving an over $20 million reimbursement to them. *See Demoulas IV*, 432 Mass. at 65-68.

In *Wilks v. Israel*, 627 F. 2d 32 (7th Cir. 1980), a prisoner filed a habeas corpus petition based on his allegation that he had assaulted the judge and, therefore, the judge was biased against him, infringing his constitutional right to a fair trial. *See id.* at 36. The court held that the petitioner's deliberate attacks on the judge could not force judicial disqualification because, if this were the case, it would encourage other such attacks and "would greatly disrupt judicial administration." *Id.* at 37. On the other hand, the court found that a judge could become so personally embroiled in the controversy that due process concerns would necessitate his removal. *See id.* To resolve the issue, the court advised that it should examine the record of the trial to determine whether the petitioner received a fair trial and, in the case at issue, the appellate court determined that the trial court's rulings were appropriate. *Id.* In this case, the trial court's rulings have survived the scrutiny of the highest court in the Commonwealth of Massachusetts which, in virtually every instance, found Judge Lopez' decisions to be appropriate and correct. This Court can take notice of this fact and conclude that there has been a determination that no actual bias by Judge Lopez against the defendants could be proven and that, accordingly, no violation of the Petitioner's Fourteenth Amendment right has occurred.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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